NO. 85-1864

Supreme Court, U.S.
FILED
MAY 9 1986
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL BOOK CORPORATION,

Petitioner,

v.

STATE OF MARYLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED FOR REVIEW

I

Does the decision of the Court of Special Appeals of Maryland conflict with the decision of this Court as to the proper standard to be applied in reviewing the massive seizure of materials presumptively protected by the Fourth Amendment?

II

Is the Maryland "Display" statute constitutional insofar as it seeks to regulate the exposure of materials to non-juveniles?

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

RANDALL BOOK CORPORATION, by David N. Kuryk, its attorney, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Court of Special Appeals of Maryland.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is reported (64 Md. App. 589, 497 a.2d 1174, 1985) and is to be found in the Appendix to this Petition. On January 9, 1986, the Petition for a Writ of Certiorari to the Court of Special Appeals was denied by the Court of Appeals of Maryland 305 Md. 175 (1986). The Motion for Recon-

sideration was denied by the Court of Appeals of Maryland on March 10, 1986. This is also contained in the Appendix.

JURISDICTION

The denial of the Petition for a Writ of Certiorari by the Court of Appeals of Maryland occurred on January 9, 1986. Motion for Reconsideration was denied by the Court of Appeals of Maryland on March 10, 1986. Jurisdiction to review this judgment by Writ of Certiorari is conferred on this Honorable Court by 28 U.S.C., Section 1257.

STATUTE INVOLVED

Annotated Code of Maryland, Article 27, Section 416D (1982 Repl. Vol.)

(a) Any person, firm or corporation is guilty of a misdemeanor if it knowingly displays for advertising

purposes any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal abuse description or narrative account of these activities or items.

(b) Any person, firm or corporation is guilty of a misdemeanor, if it knowlingly permits any such display on premises owned, rented or managed by it.

STATEMENT OF THE CASE

Pursuant to a search warrant issued on June 25, 1981, the Baltimore County Police Department, by its agents, Detectives Miller and Dunlap, seized 733 items from the book store known as the Rye Book Store at 716 Main Street

in Baltimore County, Maryland. The search and seizure was conducted on June 26, 1981. Included in the seizure were a number of magazines, paperback books, and films as is more particularly described in the property inventory. As a result of the search and seizure, the State of Maryland, by a Statement of Charges and Criminal Summons instituted criminal proceedings charging the Defendant with violations of Section 416D of Article 27 of the Annotated Code of Maryland. Specifically, in case number 75585 (District Court #08-2-104895), the State instituted 54 charges, in case 75586 (District Court #08-2-104848), the State filed 138 charges; and in case 75587 (District Court #08-2-101523), the State filed 60 charges.

The pattern followed by the

State in instituting the charges was that for each publication the State filed two charges. The first charge was for knowlingly displaying for advertising purposes a magazine (Count 1 for each publication - a violation of Section 416D(a) of Article 27) and for knowingly permitting the display of the magazine on premises rented or managed by it (Count 2 for each publication - a violation of 416D(b) of Article 27). Thus in case 75587 (08-2-101523) the 60 counts of violations of 416D of Article 27 have been filed based upon 30 publications; in case 75586 (08-2-104848) the 138 counts have been filed based on 69 publications; in case 75585 (08-2-104895) the 54 counts had been filed based upon 27 publications. In total, 252 counts had been filed against Defendant for alleged violations of 416D

of Article 27 of the Annotated Code of Maryland based upon the State's seizure of 126 publications.

The case was scheduled for trial in the District Court of Maryland for Baltimore County. However, Petitioner elected a jury trial and the matter was transferred to the Circuit Court for Baltimore County for trial.

Petitioner filed a Motion to Suppress the Evidence and a Motion to Dismiss the charging documents and after submission of Memoranda a hearing was held on November 25, 1981, based upon the legality of the search and seizure and the unconstitutionality of the statute. In an Opinion and Order of the Circuit Court for Baltimore County of January 26, 1982, the Circuit Court for Baltimore County dismissed the charges because of the unconstitutionality of same, however, upholding the le-

gality of the search and seizure.

The State and the Petitioner each appealed from the Opinion and Order of the Circuit Court for Baltimore County. In an opinion filed on November 8, 1982, the Court of Special Appeals, relying upon the then recent decision of Smiley v. State, 294 Md. 461, 450 A.2d 909 (1982) reversed the decision of the lower court on the constitutional grounds. The Court dismissed the cross-appeal on the ground that, absent a conviction, the denial of a motion to suppress was not reviewable on appeal. State v. Randall Book Corporation, 53 Md. App. 30, 452 A.2d 187 (1982). Defendant petitioned the Court of Appeals of Maryland for certiorari which was denied by the Court of Appeals of Maryland on February 24, 1983, 295 Md. 441 (1983). Subsequently, Defendant

petitioned the Supreme Court of the United States for certiorari from the decision of the Court of Special Appeals of Maryland. On October 17, 1983, the Supreme Court of the United States denied certiorari over the dissent of Justice Brennan, with whom Justice Marshall joined, 464 US 919, 104 S.Ct. 286, 78 L.Ed. 2d 263 (1983). The dissenting justices found the statute unconstitutional on its face, notwithstanding the construction of the Court of Special Appeals of Maryland. The two dissenting justices would have granted certiorari, vacated the judgment of the Court of Special Appeals of Maryland, and reinstated the dismissal of the indictment. Defendant petitioned for rehearing which was denied on December 5, 1983, 464 US 1013, 104 S. Ct. 539, 78 L.Ed. 2d 718

(1983).

After remand for further proceedings, hearings on the Supplemental Motions to Suppress and Dismiss were conducted on May 4, 1984, by the Circuit Court for Baltimore County. After the motions were denied, the case was tried before a jury in the Circuit Court for Baltimore County beginning on July 9, 1984. At the conclusion of the case, the State elected to abandon the second count of each charge, namely, the violation of 416(b) of Article 27 - knowingly permitting such a display. After denial of motion for judgment of acquittal and submission of the case to the jury, verdicts of guilty were returned on 19 counts in case 75585, 67 counts in case 75586 and 30 counts in 75587. Defendant's Motion for New Trial was denied by the Court on August 21,

1984. Thereafter the Court imposed a fine of $500.00 for each count, however, the payment of the fine and costs were stayed pending appellate review. From this conviction and sentence, a timely appeal was noted.

In an opinion filed by the Court of Special Appeals on October 4, 1985, the decision of the lower court was affirmed. The Court determined that although the search warrant may indeed have been invalid, the court adopted the "good faith" test enunciated by the Supreme Court in U.S. v. Leon, 468 U.S. ____, and Massachusetts v. Shepard 468 U.S. ____. The court also determined that it could not consider the argument asserted by Petitioner concerning the constitutionality of the statute. A Motion for Reconsideration was denied by the Court of Special Appeals on No-

vember 6, 1985. The Petition for Writ of Certiorari to the Court of Appeals of Maryland was denied on January 9, 1986. A Motion for Reconsideration was denied on March 10, 1986.

STATEMENT OF FACTS

After remand for further proceedings from the Court of Special Appeals of Maryland, the case was scheduled for hearings on the pre-trial motions to suppress the evidence and to dismiss the charging documents. The first witness at the motion hearing was Detective James Douglas Dunlap of the Baltimore County Police Department Vice Squad (M-7). Mr. Dunlap described the book store as being in a small strip shopping center on the west side of Reisterstown Road going north from the

at 716 Main Street (M-8).[1] (T.1-73)[2]. The shopping center also contains an auto repair store, auto parts store and the book store shared a common front door with a radio shop at that time. Over objection, Detective Dunlap described the area as being residential with commercial establishments along the Reisterstown Road corridor (T.1-74).

The book store is divided into four areas. The first area has a half-price sale where they sell comic books, paperback books and greeting cards. Through a small partition area, there is an "adult section" where all of the items involved in the seizure were taken. There is a third section which is

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[1]M-X, Transcript of hearing on pre-trial motions on May 4, 1984.

[2]T, 1-X, Trial Transcript.

a "peep show" booth area, although no peep shows were being operated at the time of the execution of the warrant (M-9). Detective Dunlap indicated that the exterior view indicated a large plate glass window and it was covered with plywood panelling with a sign "Open, Books, Magazines" on the front door.

The Detective had been at the book store on June 24. He had made a brief visual inventory of the contents although nothing in writing was prepared (M-11). The application for the warrant and the warrant were presented to Judge Hinkle on June 25, 1981 (M-12). The warrant was executed at approximately 11 a.m. on June 26th (M-12-13). The police officers identified themselves to the customers and the clerk of the

store and suggested that the store be closed because they were going to be executing a search and seizure warrant (M-13). The seizure of the 733 items at the store lasted several hours (M-14). Detective Dunlap was assisted by approximately four other officers. The magazines, books and films which were seized were placed in plastic bags and then taken by the police officers to the Property/Evidence Room at the Baltimore County Police Department for the purposes of packaging and inventorying the items (M-14). The material stayed in the custody of the Baltimore County Police Department from the time of the seizure, June 26, 1981, until shortly before the hearing on May 4, 1984 (M-15). The witness testified that it never had been submitted to any other judicial officer, magistrate or judge to look at

the material prior thereto.

Based upon the seizure of the materials, Detective Dunlap assisted by Detective Miller made application to a District Court Commissioner on August 5, 11 and 12 of 1981 for the issuance of charging documents against the Defendant corporation (M-17).

In case number 75585, the application was presented to the Court Commissioner on August 12, 1981 (M-18). The Commissioner never reviewed the material but only the summary which was prepared by the Detective and which was attached to the Statement of Charges (M-18). Case 75585 contained 54 counts.

In case number 75586, the application was made on August 11, 1981, before a Commissioner in the Towson District Court (M-19). Again the materials

were never submitted to the Commissioner and the Commissioner had before him only the summary prepared and attached to the Statement of Charges (M-19). Case 75586 contained 138 counts.

In case number 75587, the Statement of Charges was prepared in the Towson District Court on August 5, 1981. The Statement of Charges contained 60 counts and the Statement of Charges was issued based upon the summary prepared by the police officers and not a review of the materials seized (M-20).

The inventory was prepared by the police officers after entering the store and marking the magazines which were covered in the clear plastic bag, and, the paperback books not being covered, with a black "magic marker" (M-22).

Detective Dunlap indicated that all of the magazines seized were completely wrapped in cellophane at the time of the seizure (M-23).

The Detective stated that as they proceeded through the store that magazines were displayed in different sreas of the store. They were then grouped such as items numbered 1 through 44 which were on the right hand shelf and contained homosexual acts on the covers of the magazines (M-23-24).[3] The 44 magazines comprising the first section listed on the magazine were completely wrapped in cellophane (M-24). The second grouping of 69 magazines con-

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[3]The groupings are described in the inventory.

tained heterosexual material again based upon the observations on the covers of the magazines by the Detective (M-24). The third item listed was 30 magazines of a heterosexual nature, categorized under item 3 (M-26).

Seized under item 4 were paperback magazines not packaged in plastic and taken from another area of the store. Paperback books have newsprint pages (M-27). Seventy-four super-eight movie reels were also seized. Under item 6, 27 magazines taken from a "wire rack", were seized. Under item 7, paperback books, similar to those in item 4 were taken from the wire rack in the middle of the store (M-28). In item 8, 268 books and magazines were taken. In item 9, an additional 49 magazines were taken. The paperback books seized in items 7,

8 and 9 were not covered or sealed. The magazines were all in cellophane wrapping. In item 10, 13 books were taken. Item 11, contained 4 books. The final item was one wall poster behind the cash register. The total number of items seized were 733.

The materials seized in items number 1, 4, 5, 8, 9, 10, 11 and 12 were not the basis of any charges filed in the proceedings (M-30). The only items which served as a basis of the charges were contained in groups 2, 3 and 6. That total was 126 items and 2 charges were filed for each item (M-31).

Detective Dunlap indicated that after seizing the 733 items, that none of the material in the front of the book store was taken. This is the section that contained comics, greeting

cards, crossword puzzle books and things of that nature.

Detective Dunlap determined which of the materials would remain and that did not fall within the three sections "sexual excitement, sadomasochist abuse and sexual conduct" as defined by the Annotated Code of Maryland (M-32). Detective Dunlap estimated that between 50 and 100 magazines remained on the premises after he left (M-33). Although Detective Dunlap could not recall, a motion for the return of the property was made in the District Court of Maryland for Baltimore County before Judge Bates on September 15, 1981, are denied (M-51-52) (App. 20-26).

After hearing argument from counsel the Court denied the motion to suppress the evidence (M-68-70) and mo-

tion to dismiss the charged (M-82).

At trial, Detective Dunlap's testimony was essentially the same as at the pre-trial motion. Over objection, the search and seizure warrant, State's Exhibit 1, and the fruits of the warrant were entered into evidence (T.1-58), (1-64-67, 1-68-71).

On cross examination the Detective admitted that the entire front window of the store was covered with a sign which indicated "Open, Books, Magazines." (T.1-76). The Detective described the four sections of the book store. The first section, in front of the store, contained old issues of comics, paperback books and greeting cards and sports magazines (1-76). None of the seized materials were contained in the front section. In order to gain entry to the

adult section, one had to pass through a partition which clearly identified the area as being an "adult section" and one had to be over 18 years of age to enter (T.1-77).

The witness acknowledged that similar materials were observed in video stores in other communitites in Baltimore County (T.1-78-79).

The Detective also indicated that all of the magazines which were taken and offered into evidence were entirely covered in plastic so that he nor anyone else was able to view the contents of any specific publication (T.1-80). The only portion of any such publication ever viewed was the cover since the entire magazine was wrapped in cellophane (T.1-80).

After the detective entered the store he went to the adult section

and took the publications which were offered into evidence off of the racks at the store (T. 1-77-78).

At the conclusion of the officer's testimony, the introduction into evidence of the various publications and other exhibits, the State rested. The Motion for Judgment of Acquittal based on the constitutional and other grounds was denied (I-84-97).

Over objection, the State was permitted to reopen its case, to offer testimony by the detective of other purchases made from the book store prior to June 26, 1984 (T.2-5). Thereupon, Detective Dunlap testified that he had been conducting an investigation of the Randall Book Corporation since June, 1977. Over continuing objection, the detective was permitted to testify that he made purchases of other publications

between June, 1977, and June, 1981 (T.2-6-7). Also under objection, Detective Dunlap admitted that the material he seized were the ones he determined satisfied the criteria of depicting either sexual conduct, sexual excitement or sadomasochistic abuse. The Motion to strike the detective's further testimony and a Request for Mistrial were also denied (T.8-9).

The State again rested and a renewed Motion for Judgment of Acquittal was denied (T.2-10).

Dr. Gregory Kenneth Lehne, Assistant Professor of Medical Psychology of the Department of Psychiatry testified on behalf of the defense. Dr. Lehne was employed at the Bio-Sexual Psychohormonal Clinic of Johns Hopkins Hospital and had been so employed for approximately 3 years. In addition, he

was a licensed psychologist and certified by the American College of Sexologists. The doctor was also board certified by the American College of Sexology (T.211-212). The doctor defined sexology as the scientific study of sex. The witness had a bachelor's degree in psychology from Duke University and a doctorate in psychology from Cornell University with post graduate education in the area of sexual medicine at Johns Hopkins Hospital (T.2-12).

The witness indicated that the majority of his work at Johns Hopkins involved the diagnosis and treatment of sex offenders as well as people with a variety of sexual problems from birth defects of sex organs of young children to problems with impotence (T.2-12-13). In addition, the witness was a member of the American Psychological Association

and a variety of other similar societies.

The witness testified that he had the opportunity to review the 118 pbulications which had been offered by the State (T.2-16). The witness indicated that the magazine covers depicted sexual activity between adults. In most cases, they were white adults and in some cases inter-racially mixed, black and white adults. The individuals appeared to be in their 20's. The most common sexual activities were the types that most people commonly engage in, which is conventional heterosexual intercourse, fellatio and cunnilingus. The witness indicated that did not fall within the context of sadomasochism in terms of inflicting injury or pain as part of the process of sexual activity.

The witness distinguished this activity from the appearance and dress which many people associate with sadomasochism (T.217).

In the witness's opinion, the material depicted activities that appeared to be a normal interest in sexuality in adults that embodied certain elements of fantasies people enjoy and contained a fairly standard range of sexual activities that adults think about and engage in on some occasions (T.2-17-18).

In the witness's opinion, the material did not appear to a purient, shameful or morbid interest in sex or nudity. The witness indicated that there was no depiction of excretion in any of the publications. The witness further indicated that nudity was one of

the components of sexuality in which most people have a normal interest (T.2-18). In the witness's opinion, the material was not patently offensive (T.2-19). The witness further indicated that material did not depict cruel or unusual activities such as degradation, torture or punishment (T.2-19).

In addition, the witness believed that the material had scientific value. One was the ability of the public to learn about sexual activities by purchasing materials such as the ones before the Court. The witness used them in therapy with adults (T.2-20). Also, couples use them as a basis for discussion and improving communication about sex (T.2-21). The materials also form a source of education and enriching sexual fantasies for adults in our society

Thus, the witness believed that the materials do have scientific value (T.2-21).

Therefore, the witness concluded for a number of reasons that the materials were not obscene (T.2-21).

On cross examination, the witness explained that the subject matter of one or more of the covers of the publications was not necessarily normal if it was the only or exclusive sexual activity that the individual engaged in. However, if it was an activity that occurred occasionally it would certainly could be considered normal (T.2-22).

At the conclusion of the doctor's testimony, the defense rested and Motions for Judgment of Acquittal were renewed (T.2-33-37).

Over objection, counsel was prohibited from reading to the jury the

provisions of Article 27, Section 416 and explaining that the statute was part of a package intended to protect distribution of material to minors (T.2-79 -80).

The jurors returned verdicts of guilty except as to two of the charges submitted for their consideration (T.3-3-5).

The motion for new trial was heard before Judge Hormes on August 21, 1984. The questions previously raised, namely the constitutionality of the statute, the search and seizure and other points raised during the trial were argued and denied (S.2-24).

For purposes of sentencing, the State called Detective Dunlap to testify. The detective testified, over objection, concerning enforcement action

taken against other individual defendants and not the corporate defendant (S.26-27). The witness further testified concerning certain bank records indicating gross deposits made at Maryland National Bank from 1980 through 1981 (S.28). The Court imposed a fine of $500.00 for each count which resulted in a conviction (S.42-43). The Court further agreed to stay execution of sentence pending appellate review.

REASONS FOR GRANTING THE WRIT

I. The lower court decision conflicts with the decision of this Court as to the proper standard to be applied in reviewing the massive seizure of materials presumptively protected by the Fourth Amendment.

The decision of the Court of Special Appeals of Maryland, if left to

stand, produces the bizarre result that began with a prosecution initiated on June 25, 1981, by the issuance of a search and seizure warrant for the premises known as 716 Main Street in Baltimore County. On the following day, June 26, 1981, 733 items were seized. As a result of that seizure, a Statement of Charges was filed in the District Court of Maryland for Baltimore County in three cases alleging 252 charges based upon 126 publications. All of the charges contained allegations of violations of Section 416D of Article 27 of the Annotated Code of Maryland. At the time the prosecution was initiated, there had been no necessity for the violation to charge or prove obscenity. In fact, at the first motion to suppress and dismiss, the State argued that there

was no such necessity.

In an opinion and order of the Circuit Court for Baltimore County on January 26, 1982, the Circuit Court dismissed the charges because of the unconstitutionality of the statute.

It was not until the decision of the Court of Appeals of Maryland in Smiley v. State, 294 Md. 461, 450 A.2d. 909 (1982) that the element of obscenity was construed to be necessary for a conviction.

Based upon the decision of Smiley v. State, the Court of Special Appeals then reversed the dismissal and remanded the case to the Circuit Court for Baltimore County for further proceedings. State v. Randall Book Corporation, 53 Md. App 30, 451 A.2d. 187 (1982).

After remand, hearings on the supplemental motions to dismiss and suppress were condicted on May 4, 1984, by the Circuit Court for Baltimore County. After denial of the motions, trial was conducted in the Circuit Court for Baltimore County beginning on July 9, 1984.

Although the Court of Special Appeals recognized that the element of obscenity was never contained in the application for the original search warrant, the application nor the statement of charges, it nevertheless determined that the evidence was not excludable because of the interim decision by the Supreme Court in the cases of U.S. v. Leon, 468 U.S. ____, and Massachusetts v. Shephard, 468 U.S. ____. This concluded the Court's analysis.

The lower court failed to consider that the issue of "good faith" was neither argued nor decided by the lower court. It was considered as a matter of first impression by the Court of Special Appeals of Maryland. The Court also failed to consider that since the issue of obscenity had never been addressed in the application for the warrant or by the magistrate, and how this would satisfy the Leon standard. See U.S. v. Guarino, 610 F.Supp. 371 (D.C. R.I. 1984). More importantly, the court failed to consider the fact that a massive seizure of 733 items occurred and this fatal defect was not cured by the Leon and Shepard decision. Heller v. New York, 413 U.S. 483 (1973); A Quantity of Books v. Kansas, 378 U.S. 205 (1964), Marcus v. Search Warrant, 367 U.S. 717 (1961).

Finally, the recent decision of this Court in N.Y. v. P.J. Video, Inc., ____ U.S. ____(decided April 22, 1986) sets forth the appropriate legal standard to adjudge the issuance of a warrant authorizing the seizures of presumptively First Amendment materials. The lower court decision in this case is in direct conflict with this determination insofar as it permits a warrant to issue without any allegation of obscenity to support the affidavit and application for the warrant. The magistrate was never called upon nor did he find probably cause as to the obscenity issue in this case. For these reasons, a grant of certiorari is respectfully requested to review the decision below.

II. The lower court decision

raises significant and recurring problems in the administration of crimal justice.

The decision below involves interpretation of Section 416f through 416g of Article 27 of the Annotated Code of Maryland entitled "Nudity and Sexual Displays". It is similar to many of the recent "display" type statutes enacted around the U.S. to stop the exposure and distribution of obscene material to juveniles. N.Y. v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 72 L.Ed. 2nd 1113 (1982). However, the Maryland law does not require that exposure or distribution to minors must occur. Because of this flaw, Petitioner has maintained that in its present form, the statute is overbroad and vague.

This Statute was initially construed by the Court of Appeals of Maryland decision of Smiley v. State, 294 Md. 461, 450 A.2d 909 (1982). The Court of Special Appeals passed constitutional muster. Petitioner believes, however, that the construction by the Court of Appeals and so applied by the Court of Special Appeals, in the case of Smiley is still constitutionally overbroad and in need of further interpretation because of its apparent ever growing use by the law enforcement authorities of the State of Maryland. To the extent that the Court of Special Appeals of Maryland relied upon the Supreme Court's decision of New York v. Ferber, 458 U.S. 747 (1982), Petitioner respectfully suggests that such reliance is misplaced. The Ferber case involved and this Court's

decision was limited to a case of juvenile exploitation in such a work. This Court was not called upon nor did it express an opinion on the statute involving non-juvenile exposure, exploitations or distribution. See, e.g., New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 at 3365 (Opinion of Justice Brennan with whom Justice Marshall Joined in concurring). The Court of Special Appeals has now applied the Ferber decision to a case involving alleged non-juvenile exposure and Petitioner respectfully requests that certiorari be granted to review the decision below and to make clear that its application to those cases should involve either juvenile sexual exploitation, abuse of children or exposure to juveniles. It is signi-

ficant that no such limitation is now placed upon Section 416f and 416g of Article 27 of the Annotated Code of Maryland.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition be granted.

Respectfully submitted

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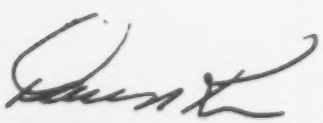
5 Light Street, Suite 950
Baltimore, Maryland 21202
(301) 752-7125
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May, 1986, a copy of the aforegoing Petition for Writ of Certiorari was mailed to Richard Rosenblatt, Esquire, Assistant Attorney General, Musney Building, 7 North Calvert Street, Baltimore, Maryland 21202, and to Solicitor General of the United States, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, DC 20530.



David N. Kuryk

APPENDIX

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 52

September Term, 1985

RANDALL BOOK CORPORATION
t/a RYE BOOK STORE

v.

STATE OF MARYLAND

Weant
Bloom
Getty, James S. (retired,
specially assigned),
JJ.

OPINION BY BLOOM, J.

Filed: October 4, 1985

This "dirty books" case, as Horace Rumpole (rumpole of the Bailey) might describe it,[1] involves an interplay between the First and Fourth Amendments to the United States Constitution. It also tends to demonstrate, in a negative manner, the wisdom of an observation made by the poet Hesiod some twenty-six centuries ago, that "right timing is in all things the most important factor."[2]

The case originated in the summer of 1981. Ordinarily, with "right timing," it would have reached us in its

[1]Mortimer, John. Rumpole's Return. Advanpress Ltd., 1983.

[2]Not as dramatically, of course, as Senator Gerald Nye's selection of December 7, 1941, as an appropriate date to deliver an address to an America First rally.

present posture long before the summer of 1984 and might well have resulted in a reversal of the 116 convictions from which this appeal was taken. As it is, because of the decision handed down by the Supreme Court on July 5, 1984, in United States v. Leon, 468 U.S. ____, 104 S. Ct. 3405, and Massachusetts v. Sheppard, 468 U.S. ____, 104 S. Ct. 3423, we reach the opposite result. We shall explain.

Background

Appellant, Randall Book Corporation, operated the Rye Bookstore in Reisterstown, Maryland. The store was divided into four sections, one section in the back being devoted to the display and sale of "adult" books, magazines

and films.[3] For several years the Baltimore County police department kept the store under observation, hoping to find some violation of the law. Finally, on four occasions in March, May and June of 1981, Detectives Miller and Dunlap purchased magazines which they had selected from a display rack in the back room of Rye Book Store. Each sale resulted in the arrest and trial of the salesclerk for violation of Md. Ann. Code art. 27, Section 416D, which provides:

> § 416D. Displaying certain visual representations for advertising purposes.
>
> (a) Any person, firm or corporation is guilty of a

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[3]Another section was set aside for "peepshows" but was not in use at any time pertinent to this case.

misdemeanor if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visural representation or image of a person or portion of the human body that depicts sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal description or narrative account of these activities or items.

(b) Any person, firm or corporation is guilty of a misdemeanor, if it knowingly permits any such display on premises owned, rented or managed by it.

"Sadomasochistic abuse," "sexual conduct," and "sexual excitement" as used in § 416D are defined in § 416A as follows:

(c) Sadomasochistic abuse means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, or otherwise physically restrained.

(d) Sexual conduct means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

(e) Sexual excitement means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

The first two prosecutions resulted in convictions and fines of $250 each, the third salesclerk was given probation before judgment and the fourth was awaiting trial as of June 25, 1981, when Detectives Miller and Dunlap decided to adopt a new strategy in their campaign to prevent the citizens of Reisterstown from being offended by the sight of salacious material "displayed for adver-

tising" in the "adults only" section in the rear of the Rye Book Store. The prosecution of appellant's salesclerks on a retail basis, i.e., for one book or magazine at a time, did not seem to have the desired effect of closing the book store, although it did cause a turnover in personnel. Accordingly, on June 25, 1981, the officers made an application to a judge of the District Court of Maryland for a warrant to seize and remove from appellant's store books, magazines, photographs, films, and posters "that are displayed for advertising purposes which depict sadomasochistic abuse, sexual conduct, and sexual excitement." The application for the warrant and supporting affidavit were extremely thorough and detailed. They described the premises and, in

general terms, the types of scenes and activities depicted on the covers of books and magazines on display in the back room of the book store Attached to the affidavit, by way of samples, were photocopies of the front covers of the four magazines previously purchased by the officers and used in the prosecutions of appellant's salesclerks. Two of them, "Taskmaster," Volume 1, Number 1 and "Bondage Movie Review," had color photographs on the front and back covers of nude or scantily clad women bound and gagged. A third, "Men of Action," No. 1, depicted on its cover a nude man bound and gagged. The fourth, "Hot Dog," had a color photograph on the front cover of a woman performing fellatio on a male and a photograph on the back cover of the man

performing an act of cunnilingus on the woman. The application and affidavit set forth the officers' prior activities and observations, the prosecutions of the salesclerks and results thereof and continued with the averment that on June 24, 1981, the affiants revisited the store and found that it continued to display for advertising purposes, in violation of Art. 27, Section 416D, the same types of materials previously described and exampled by the annexed photocopies.

On the basis of the application, affidavit and exhibits, the District Court judge issued the requested warrant to enter and search appellant's premises and to "(s)eize and remove all books, magazines, photographs, films and posters that are displayed for ad-

vertising purposes which depict sado-masochistic abuse, sexual conduct, and sexual excitement." Armed with that warrant, Detective Dunlap and several other officers presented themselves at Rye Book Store about 11:00 a.m. on June 26, 1981, and, over the next several hours, they seized and carried away some 733 items that had been on display racks or otherwise exhibited to prospective purchasers. Materials in boxes or in cabinets were not taken by the police. From the 733 items seized, the police selected 126 magazines as bases for prosecuting appellant.[4] Three separate charging documents were filed in the

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[4]The remaining items were never returned to appellant nor was their eventual disposition ever disclosed.

District Court, charging appellant with a total of 252 offenses, viz., one count for displaying prohibited material for advertising purposes (Art. 27, Section 416D(a)) and one count for knowingly permitting such material to be displayed for advertising purposes (Art. 27, Section 416D(b)) for each magazine. Appellant requested a jury trial on each charging document and the cases were removed to the Circuit Court for Baltimore County, where they were consolidated.

Appellant moved (1) to dismiss the charging documents on the ground that the statute upon which the charges were based was unconstitutional and (2) to suppress the evidence seized from its store on the grounds that (a) there was

insufficient probable cause for the issuance of the warrant and (b) the seizure was unreasonable despite the warrant. The court denied the suppression motion but granted the motion to dismiss, holding that Art. 27, Section 416D was unconstitutionally vague and overbroad.

The State appealed from the dismissal and appellant cross-appealed from the denial of its suppression motion. Before this court rendered its decision, the Court of Appeals ruled on the constitutionality of Section 416D. It held, in Smiley v. State, 294 Md. 461 (1982), that in enacting Section 416D the legislature was broadly prohibiting advertising depicting obscenity and, as such, although the statute does not mention the word "obscenity," it embodies the

latest Supreme Court definition of obscenity. So construed, the section was held to be constitutional and not overbroad. Bound by that decision, we reversed the trial court's dismissal of the charging documents. Since there could be no appeal from the denial of a motion to suppress, absent a judgment of conviction, we dismissed appellant's cross-appeal. State v. Randall Book Corporation, 53 Md. App. 30 (1982). The Court of Appeals denied appellant's petition for certiorari, 295 Md. 440, 441 (1983), as did the Supreme Court of the United States, 464 U.S. 919 (1983), with Justices Brennan and Marshall dissenting. Appellant's petition for rehearing was also denied. 464 U.S. 1013 (1983).

Eventually the case found its way back to the circuit court, where appellant filed a supplemental motion to dis-

miss and a supplemental motion to suppress, both based upon the Smiley interpretation of Section 416D. The supplemental motion to dismiss asserted, inter alia, that in the absence of any claim of obscenity there was no probable cause for the issuance of the charging documents and that the charging documents were defective for failure to allege an essential element of the offense, namely, obscenity. The supplemental motion to suppress asserted that, since obscenity was never considered, the application for the search warrant did not contain probable cause for its issuance. It also contended that the search warrant was overbroad and, therefore, a general warrant; that the massive seizure was unlawful; and that Randall Book Corporation was not afforded

an adversary hearing prior to seizure to determine whether the material seized was obscene or non-obscene literature protected by the First Amendment. Both motions were denied, and the case was finally brought to trial before a jury in July, 1984.

The State abandoned all counts based upon subsection 416D(b), knowingly permitting the material to be displayed for advertising purposes, leaving 126 counts (one for each magazine named in the charging documents) based upon subsection 416D(a), exhibiting the magazine for advertising purposes. The jury returned 116 guilty verdicts and 10 not guilty verdicts, and the court imposed a fine of $500 for each conviction.[5] Payment

[5]The maximum fine for each conviction is $1000.

of the fines was suspended pending the outcome of this appeal.

Issues

Although the convictions necessarily required a finding that the covers of the magazines were obscene, we are not asked by appellant to determine whether they are in fact obscene under the test stated in Miller v. California, 413 U.S. 15 (1973). Nor are we asked to determine whether the proprietor of a bookstore who places magazines on a rack in a room from which minors are intended to be excluded is "displaying" the covers of those magazines "for advertising purposes" within the meaning of the statute, or whether, under the Rule of Lenity, a single display of 116 magazines in violation of Section 416D is punishable as one offense or as 116

offenses.[6] The only issues raised by appellant are:

(1) Was the massive seizure of hundreds of books, magazines and films from defendant book store pursuant to a search and seizure warrant which failed to address the First Amendment implications of the seizure, improper, and hence, did the trial court err in failing to grant defendant's motion to suppress the evidence obtained as a result of the search and seizure?

(2) Is Section 416D of Article 27 unconstitutionally overbroad in its application?

(3) Did the lower court err in allowing the State to reopen its case?

(4) Did the trial court err by prohibiting applicant from reading the preamble to the statute in closing argument?

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[6]For a discussion of the Rule of Lenity, see Johnson v. State, 56 Md. App. 205, 212-16 (1983).

Our answer to each of these questions being "No," we will affirm the judgments of the circuit court.

I.

Appellant first contends that all of the materials seized by the police and placed in evidence should have been suppressed at trial because the warrant on which the seizure was made was improper and defective. Appellant argues, first, that the application for the warrant and its supporting affidavit did not provide sufficient facts and background for issuing judge to find probable cause to believe that the statute was being violated and second, that the warrant as issued was overbroad, that is, that it lacked the requisite specificity to apprise the police of which particular items they could seize or to

guard against the wrongful seizure of material protected by the First Amendment.

Elaborating on its argument that the application and affidavit did not establish probable cause to conclude that appellant was in violation of the statute, appellant asserts that the application and affidavit failed to contain a description sufficient to allow the issuing judge to conclude that any of the magazines or other materials seized fell within the purview of the statute. This assertion is unfounded. The affiants provided the judge with an adequate description of the premises in which the materials were displayed and the nature of the pictures on the covers of the magazines displayed therein, graphically illustrating those descriptions by exhibiting samples of similar material they had earlier purchased. The issuing

judge had probable cause to believe that what the detectives described both by word and example constituted material which violated Section 416D.

The affiants offered no improper conclusions of their own that probable cause existed, as would be proscribed by Grimm v. State, 7 Md. App. 491 (1969). Rather, affiants stated that they were in appellant's store, that the materials described and exhibited with their application were found by them in the store and purchased by them from appellant, and that the great majority of the other material in the adult section of the store was still in the same condition and appearance as it was when the observations were made. The determination of probable cause was made only by the judge after he was presented with the "appropriate background facts." Brooks,

Keaton and Patterson v. State, 13 Md. App. 151, 156 (1971).

The standard for probable cause in a case such as this has been established in Maryland for some time.

> Probable cause, which is less than certainty or demonstration but more than suspicion or possibility, is to be determined by the judge or justice who issues the warrant, and if a prudent and cautious man would be justified from the facts presented to show its existence in believing that the offense had been or was being committed, the warrant properly may be issued.

Henson v. State, 236 Md. 518, 521 (1964) (quoted by Henderson v. State, 243 Md. 342, 344 (1966)). That standard was satisfied in this case.

Having examined the four corners of the application and affidavit alone, as required by Everhart v. State, 20 Md. App. 71, 82 (1974), we conclude that an adequate background was presented for

the judge to find probable cause to believe that appellant was violating Art. 27, Section 416D by displaying in its store, for purpose of advertising, material proscribed by the statute.

Appellant's next argument brings into focus the interplay between the First and Fourth Amendments. Each of those amendments is designed to protect entirely different aspects of an individual's rights and liberties from invasion by the federal government and, through the Fourteenth Amendment, by the States. The First Amendment affords no protection against unreasonable searches and seizures of an individual's person or property; the Fourth Amendment provides no protection for an individual's right of free speech. But literature protected by the First Amendment--books,

magazines and films that are not obscene and are neither the fruits, instrumentalities, nor evidence of crime--constitute property that the Fourth Amendment protects from unreasonable search and seizure. It is in that context that we examine appellant's contention that the search warrant in question was overbroad, i.e., that it was not precise enough to prevent the officers who executed it from seizing material protected by the First Amendment. Where material sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." Stanford v. Texas, 379 U.S. 476 (1965).

Material may not be seized merely because it depicts sadomasochistic abuse, sexual conduct, or sexual excitement. To

be subject to seizure, it must also be obscene as that term may from time to time be defined or re-defined by the Supreme Court. (The current definition is set forth in Miller v. California, supra.) Otherwise, it may be possessed and exhibited under the shield of the Constitution. It was precisely because a literal reading of Section 416D would have prohibited the display of First Amendment protected material that the Court of Appeals found it necessary to read "obscenity" into that statute. In Smiley v. Smith, supra, the Court found that "the legislature in enacting this section was broadly prohibiting advertising depicting obscenity" and concluded that the Miller standards for obscenity are embodied in Section 416D. 294 Md. at 464-65.

Reading the search warrant in the instant case in light of Smiley presents the State with a dilemma. If the warrant is read literally, it appears to authorize the seizure of material protected by the First Amendment and would be invalid for that reason. If, on the other hand, we read into the warrant, as the Smiley court read into the statute, an implied requirement that the material must also be obscene, the police would be given unfettered discretion to determine which materials are obscene, a matter which may only be determined by a neutral and detached judicial officer. The Fourth Amendment does not permit the issuance of a warrant that leaves it entirely to the discretion of the officers conducting the search to decide what items

are obscene and therefore suject to seizure. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Stanford v. Texas, supra; Marcus v. Search Warrant, 367 U.S. 717 (1961).

Prior to July 5, 1984, when the Supreme Court delivered its opinions in United States v. Leon, supra, and Massachusetts v. Sheppard, supra, we were constrained to exclude evidence unlawfully seized, the exclusionary rule adopted by the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914), having been extended to state prosecutions by Mapp v. Ohio, 362 U.S. 643 (1961). Belton v. State, 228 Md. 17 (1961). In view of Leon and Sheppard, however, it is immaterial whether the search warrant in this case was fatally defective either as authorizing the sei-

zure of First Amendment protected material or as permitting the police officers to determine what material is obscene. In Leon, the Supreme Court unequivocally held that, even if a search warrant is defective, evidence seized by virtue of the warrant need by suppressed "only if the officers were dishonest or reckless or could not have harbored an objectively reasonable belief in the existence of probable cause." 468 U.S. at ____, 104 S. Ct. at 3423 (1985). Appellant has not asserted that the judge who issued the warrant abandoned his proper role or that the police officers were dishonest or reckless, nor could appellant persuasively argue that the officers "could not have harbored an objectively reasonable belief in the existence of probable cause." Indeed,

an examination of the record leads to the inescapable conclusion that the officers were as scrupulous in their efforts to protect appellant's Fourth Amendment rights as they were zealous in their efforts to prosecute appellant for exceeding its First Amendment privileges. We therefore hold, in accordance with the Leon standards, that the objective good faith of the officers in executing this warrant would render any defect in the warrant irrelevant. The trial court did not err in refusing to suppress the evidence.

We see no reason why the principles of Leon and Sheppard should not be applied to facts which occurred before those decisions were rendered. Although a Fourth Amendment decision making a "clear break with the past" should not

be applied retroactively, United States v. Peltier, 422 U.S. 531 (1975); Desist v. United States, 394 U.S. 244 (1969), neither Leon nor Sheppard was a clear departure from prior decisions. As Justice Brennan pointed out in his dissenting opinion, once the Court had enunciated, in United States v. Calandra, 414 U.S. 338, 348 (1974), that the exclusionary rule is merely a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right," the eventual adoption of a "good faith exception" to the exclusionary rule was entirely predictable. 104 S. Ct. at 3430. See also, Michigan v. DiFillippo, 443 U.S. 31 (1979), in which the Court held that

evidence obtained through a search incident to an arrest made in good faith reliance upon an ordinance that was later declared to be unconstitutional need not be excluded. In any event, although the supplemental motion to suppress was argued and decided prior to Leon and Sheppard, the trial itself took place after Leon and Sheppard were decided.

II.

Appellant's second contention is that Section 416D is unconstitutionally overbroad. This very issue was decided by the Court of Appeals in Smiley, supra, leaving no room for argument here; Section 416D is not unconstitutional.

Appellant also asserts that Section 416D denies appellant due process and

equal protection of the law "insofar as it provides First Amendment material less protection against censorship and suppression under Section 416A-416G than if charged with obscenity pursuant to Sections 417-423 of the Annotated Code of Maryland in that Section 417 et seq. requires (sic) an adversary hearing prior to seizure of the material." The Smiley court, however, held that Section 416D, which is the only section at issue, addresses only material that is obscene as defined by Miller and is therefore not First Amendment material.

III.

Appellant's third contention is that the trial court erred in allowing the State to reopen its case. It appears from the record that the State had suc-

cessfully introduced into evidence the search warrant application and affidavit. After the State rested its case, the court granted appellant's notice to strike this evidence, which included the information that similar material had been displayed for several months before these alleged offenses. Since that information was deemed necessary to prove the element of scienter, the court allowed the State to elicit it by oral examination of Detective Dunlap.

The conduct of the trial is a matter of wide discretion with the trial judge. We would not hold that a judge has abused his discretion unless his action was of such magnitude as to amount to the denial of a fair trial. As this court noted in Spillers v. State:

> We have reviewed this contention in a number of cases and have uniformly held that the trial judges are vested with the widest discretion in the conduct of trials. Ordinarily, there is no abuse of discretion in permitting the State to reopen its case for the purpose of proving important or even essential facts to support a conviction. . . .

10 Md. App. 643, 649 (1971). Under the circumstances the trial judge did not abuse his discretion in permitting the State to reopen its case.

IV.

Finally, appellant argues that the trial court erred in not allowing its counsel to read the preamble of the statute to the jury. We do not agree. To allow the jurors to consider the preamble would be appropriate only if they were to be the judges of the law as well

as the facts. The jurors are judges of the law only when there is a dispute as to the meaning of the law. There was not dispute as to the meaning of the law in this case. Appellant attempted to argue to the jury its interpretation of the purpose of the statute, not its meaning. The trial court is well within its discretion to prohibit arguments or references to the meaning of a statute when that meaning is not disputed.

Appellant contends that the purpose of the statute is to protect minors from exposure to materials such as those involved here and that the jury was entitled to consider this in determining whether the statute was applicable. This contention, however, was disposed of in Smiley, where the Court said: "Section

416D is the only section (out of the seven sections included in Article 27, Sections 416A-G) that is not specifically directed towards minors. We conclude that the legislature, in enacting this section was broadly prohibiting advertising depicting obscenity." 294 Md. at 464. We hold that the court did not abuse its discretion with respect to appellant's closing argument.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

RANDALL BOOK CORPORATION t/a RYE BOOK STORE	*	In The Court of Appeals of Maryland
v.	*	Petition Docket No. 480 September Term, 1985
STATE OF MARYLAND	*	(No. 52, September Term, 1985 - Court of Special Appeals)

ORDER

Under consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer and conditional cross-petition filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Judge Eldridge would have granted these petitions.

/s/ Robert C. Murphy
Chief Judge

Date: January 9, 1986

RANDALL BOOK CORPORATION t/a Rye Book Store	*	In the Court of Appeals of Maryland
	*	Petition Docket No. 480
v.	*	
	*	September Term, 1985
STATE OF MARYLAND	*	
	*	

O R D E R

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 10th day of March, 1986

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy
Chief Judge